Supreme Court, U.S.
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No. 97-773

In The

Supreme Court of the United States

October Term, 1997

RAYMOND J. DIRUSSA,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC.
and LAWRENCE J. SOLARI, JR.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

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13 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THE COURT SHOULD ESTABLISH A MEANINGFUL STANDARD OF REVIEW FOR ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS TO PROVIDE REVIEWING COURTS WITH THE POWER TO CORRECT PLAIN ARBITRAL ERROR THAT RESULTS IN A MISCARRIAGE OF JUSTICE TO ENHANCE THE FAIRNESS, INTEGRITY AND PUBLIC REPUTATION OF COMPULSORY ARBITRATION 4

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE OF THE CONFLICT BETWEEN MISCO AND THE COURT OF APPEALS' DECISION AND TO CLARIFY THE PUBLIC POLICY GROUND FOR REVERSING ARBITRATION AWARDS 7

III. THE COURT SHOULD GRANT CERTIORARI BECAUSE MR. DIRUSSA RAISED THE FEDERAL QUESTION ON WHICH HE SEEKS SUPREME COURT REVIEW TO THE COURTS BELOW 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Carlson v. Green, 446 U.S. 14 (1980) 9

Chisholm v. Kidder, Peabody Asset Management, Inc., 966 F.Supp. 218 (S.D.N.Y. 1997) 9

Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997) 9

Connor v. Flinch, 431 U.S. 407 (1977) 4, 10

Dewey v. Des Moines, 173 U.S. 193 (1899) 8

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 1, 2, 5, 6

Johnson v. United States, ___ U.S. ___, 117 S.Ct. 1544 (1997) 4

Stevens v. Department of Treasury, 500 U.S. 1 (1991) ...8, 9

United Paperworkers Intern. Union, AFL-CIO v. Misco, 484 U.S. 29 (1987) 6, 7, 8

United States v. Olano, 507 U.S. 725 (1993) 4, 6

United States v. Virginia, ___ U.S. ___, 116 S.Ct. 2264 (1996) 4, 10

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 5

U.S. v. Atkinson, 297 U.S. 157 (1936) 3

U.S. v. Frady, 456 U.S. 152 (1982) 3

U.S. v. Williams, 504 U.S. 36 (1992) 9, 10

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 9

Washington v. Davis, 426 U.S. 229 (1976) 4, 10

INTRODUCTION

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) compelled employees who signed arbitration agreements to submit their statutory employment discrimination claims to arbitration rather than to the judicial forum created by statute. To ensure that claimants who submitted to arbitration did not lose their substantive statutory rights and remedies, the Court held that judicial review of arbitration awards would ensure arbitral compliance with statutory mandates. 500 U.S. at 32 n.4. Thereby, *Gilmer* intended to protect claimant's substantive rights and remedies from abridgement by arbitrators. The instant case presents the exact situation the *Gilmer* Court meant to prevent. Here, in a clear miscarriage of justice, the arbitration panel denied the claimant, Raymond J. DiRussa, the explicit, mandatory statutory remedy of attorney's fees.

Both the district court and the court of appeals agreed that a miscarriage of justice had occurred. Both courts expressly acknowledged that Mr. DiRussa should have been awarded attorney's fees. Both courts also recognized that no basis existed whatsoever for the arbitration panel to have denied him these fees. (Appendix to Petition for A Writ of Certiorari to the United States Court of Appeals for the Second Circuit dated November 3, 1997 ("Pet.App.") 8, 17). Indeed, even respondents concede that the arbitration panel should have awarded attorney's fees to Mr. DiRussa (Respondents' Brief in Opposition ("Opp.Br.") at 11). In essence, everyone agrees that Mr. DiRussa should have been awarded attorney's fees. However, both courts denied Mr. DiRussa attorney's fees. Both ruled that the injustice he suffered in

arbitration was not its problem, but was either the fault of the arbitration process or the result of perceived existing rules that limit court review of arbitration awards. (Pet.App. 11-12, 17, 25-27)

This result is manifestly unjust to Mr. DiRussa and undermines both the statutory enforcement mechanisms of the discrimination laws and the fairness and integrity of the system of compulsory arbitration the *Gilmer* Court endorsed. It creates the anomaly that arbitrators are free to disregard statutory mandates so long as they do so without a reasoned written opinion.[1] Results such as this have prompted public criticism of the fairness of arbitration proceedings in recent years.[2] Mr. DiRussa petitions this Court to rectify this anomaly by imposing a meaningful standard of review that would, at a minimum, curb the grossest injustices inflicted by the arbitration system that this Court has forced discrimination claimants to accept.

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[1] *Gilmer* presumed that the written opinion requirement of the NYSE rules would lead to reasoned written opinions that would provide a basis for effective review. 500 U.S. at 32 n.4. As this case demonstrates, that has not been the case. Because the ADEA mandates an award of attorney's fees to a successful claimant, the absence of a written opinion does not preclude review here on this issue. However, this absence affects Mr. DiRussa's other claims for relief, such as punitive damages, which the award fails to address despite the fact that respondent Solari's own secretary testified that Solari ordered her to backdate a fictitious memorandum, copy it, and shred the original, to make Mr. DiRussa's termination appear legitimate. (Pet.App. at 3).

[2] *See, e.g.*, Pamela Savage Forbat, "Employee v. Employer," REGISTERED REPRESENTATIVE, April 1997, 64-69.

This could be done as was argued below by adapting existing standards of review such as manifest disregard of law to correct clear non-compliance with Congressionally mandated requirements. Alternatively, this could be done by instituting, at a minimum, a standard historically employed by the Court to rectify errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings" – the plain error standard. *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936). Institution of at least a plain error standard of review for arbitration of statutory employment discrimination cases would enhance the fairness and integrity of statutory claims, and thereby promote public confidence in arbitration as a forum for resolving statutory employment discrimination disputes. Under a plain error standard of review, a reviewing court would have the "latitude to correct particularly egregious errors on appeal . . . in those circumstances in which a miscarriage of justice would otherwise result." *U.S. v. Frady*, 456 U.S. 152, 163 (1982). In this case, application of a plain error standard of review would have permitted the courts below to correct the injustice that they recognized had occurred to Mr. DiRussa.

I.

THE COURT SHOULD ESTABLISH A MEANINGFUL STANDARD OF REVIEW FOR ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS TO PROVIDE REVIEWING COURTS WITH THE POWER TO CORRECT PLAIN ARBITRAL ERROR THAT RESULTS IN A MISCARRIAGE OF JUSTICE TO ENHANCE THE FAIRNESS, INTEGRITY AND PUBLIC REPUTATION OF COMPULSORY ARBITRATION

A court may notice plain error when it "affects substantial rights" and "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544, 1548 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 731 (1993)). This includes plain error committed in civil cases heard by the courts of appeals, *see, e.g., United States v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264, 2286 (1996) (in gender discrimination case Fourth Circuit "plainly erred" in exposing Virginia's remedial plan to a deferential analysis); *Connor v. Flinch*, 431 U.S. 407, 421 n.19 (1977) (In race discrimination case, "this Court has the authority and the duty in exceptional circumstances to notice federal court errors to which no exception has been taken when they 'seriously affect the fairness, integrity or public reputation of judicial proceedings' ") (cites omitted); *Washington v. Davis*, 426 U.S. 229, 238-239 (1976) (D.C. Court of Appeals application of Title VII standards in race discrimination case was plain error), and the rule applies whether the issue was raised in the questions presented or below. *See* Rule 24.1(a); *Connor, supra*, 431 U.S. at 421 n.19.

No court would have *or could have* denied Mr. DiRussa's application for attorney's fees. As a successful

claimant, Mr. DiRussa was entitled to attorney's fees as a matter of law. If it had, a reviewing court would certainly have reversed that decision for plain error. The same result should obtain when an arbitration panel, rather than a district court, commits plain error by denying a successful age discrimination claimant a mandatory statutory remedy. Indeed, this is precisely what *Gilmer* intended to ensure by promising that arbitration decisions would comply with substantive statutory rights and promising effective review of arbitration decisions. 500 U.S. at 32 n.4.

The result here undermines *Gilmer*. By permitting the panel to deny Mr. DiRussa's statutorily mandated fees under the guise of the manifest disregard standard, the courts below elevated arbitrators above Article III judges and empowered them to ignore statutory and judicially-created rights that are beyond dispute. Because of the difference between the damages awarded to him by the panel and the amount of his attorney's fees, Mr. DiRussa is worse off than he would have been had he never instituted suit. This miscarriage of justice drastically undermines the fairness of arbitration proceedings and the integrity of discrimination laws. This Court should therefore grant certiorari and establish a standard of review that ensures that victims of discrimination do not lose substantive statutory remedies such as the ADEA's attorney's fees, rather than permit an unrestrained system that allows arbitrators to "fashion their own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).

Respondents, however, argue that the current practice should continue. That argument cannot be serious as

it is directly contrary to the position the securities industry took before this Court in *Gilmer* in arguing that discrimination victims' statutory rights and remedies would be protected in arbitration. Though they admit that the panel wrongfully denied Mr. DiRussa's application for attorney's fees (Opp.Br. at 11), respondents nonetheless insist that the very standard of review that has operated to deny that statutory remedy, manifest disregard of law, should be retained without modification. (Opp.Br. at 10).

One argument respondents make in opposition to certiorari is that by using the term entitled rather than mandatory, Mr. DiRussa "allowed the arbitration panel to believe they had the discretion to award fees," and that the use of entitled constituted a waiver of his right to attorney's fees. (Opp.Br. at 11) Respondents conveniently forget to include in this analysis their duty of candor to inform the panel that attorney's fees were mandatory. Rules of Professional Conduct 3.3(a)(3). And, obviously, Mr. DiRussa's use of the word entitled was not a waiver of his remedy of attorney's fees. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (waiver is the "intentional relinquishment or abandonment of a known right") (cite omitted).

Respondents also oppose certiorari on the ground that "there is absolutely nothing in any Supreme Court decision which indicates that the scope of review for statutory claims is any different from any other arbitrated claim." (Opp.Br. at 12) This is not so. Both *Gilmer* and *United Paperworkers Intern. Union, AFL-CIO v. Misco*, 484 U.S. 29, 43 (1987) hold that review of arbitration decisions ensures that discrimination victims do not lose statutory

rights by submitting to arbitration. However, respondents' position highlights the need for the Court's intervention on an issue of national importance. Indeed, the absence of a decisive ruling by the Supreme Court on this "important question of federal law" is one of the express grounds for granting certiorari provided by this Court's Rules. Rule 10(c).

II.

THE COURT SHOULD GRANT CERTIORARI BECAUSE OF THE CONFLICT BETWEEN *MISCO* AND THE COURT OF APPEALS' DECISION AND TO CLARIFY THE PUBLIC POLICY GROUND FOR REVERSING ARBITRATION AWARDS

Under *Misco, supra,* 484 U.S. at 43, courts may not enforce the award of arbitrators who, lacking the discretion to do so, deny a successful ADEA claimant his mandatory remedy of attorney's fees. The decision of the court of appeals upholding the panel's wrongful denial of Mr. DiRussa's application for attorney's fees is in direct conflict with the holding in *Misco.*

In light of this conflict, the court of appeals was uncertain of its own ruling. It stated, "Whether to vacate an arbitration award based on this type of broadly-stated public policy poses a difficult question, and it is far from clear under the cases cited above where to draw the line in determining whether the public policy allegedly violated is important enough to vacate an award." It distanced itself from its decision by stating, "The key issue is actually not whether to expand the 'public policy' ground for reversal of arbitration awards but whether a standard of review less deferential than 'manifest disregard' may

be appropriate when certain federal statutory rights are involved . . . " (Pet.App. 16-17).

The opinion of the court of appeals did more than simply misapply a stated rule of law, as respondents contend. The court of appeals passed on the nationally important issue of a reviewing court's power to invoke the *Misco* rule and produced a result that contradicts an express statutory provision – the ADEA's mandate on attorney's fees – as well as Supreme Court decisional law. Given the court of appeals' equivocation on this issue, and a result directly contrary to *Misco*, defendants are wrong to contend that this Court has no ground to review the decision of the court of appeals on this issue. Rather, the importance of the issue involved and the uncertainty of the scope of this ground for reversing arbitration decisions, as illustrated here and in *Misco* itself, 484 U.S. 29, 46 (1987) (Blackmun, J., concurring), compel the Court to grant certiorari.

III.

THE COURT SHOULD GRANT CERTIORARI BECAUSE MR. DIRUSSA RAISED THE FEDERAL QUESTION ON WHICH HE SEEKS SUPREME COURT REVIEW TO THE COURTS BELOW

Parties that appear before the Supreme Court on a federal question are not confined to the same arguments that were discussed below, so long as the same question is in issue. *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). For example, in *Stevens*, 500 U.S. at 8 (1991), the Court granted certiorari based on an argument that petitioner raised for the first time before the Court, because the

argument related to the substantive issue decided by the courts below – whether the petitioner filed his lawsuit in a timely fashion.

In his petition, Mr. DiRussa raised the same federal question he raised before the district court and the court of appeals: whether the panel could lawfully deprive him of his mandatory statutory remedy of attorney's fees. Therefore, under *Stevens, supra,* the Court should grant certiorari should it find that the question presented in the petition is worthy of certification. Moreover, the issue presented in the petition regarding the proper standard of review of plain arbitral error in the employment discrimination context is an important issue that has recurred in federal courts as a result of the prevalence of arbitration agreements. *See, e.g., Cole v. Burns International Security Services,* 105 F.3d 1465 (D.C.Cir. 1997); *Chisholm v. Kidder, Peabody Asset Management, Inc.,* 966 F.Supp. 218 (S.D.N.Y. 1997). It has been squarely presented and briefed by both parties. As such, this Court should review this case on certiorari. *Carlson v. Green,* 446 U.S. 14, 16 n.2 (1980); *see also U.S. v. Williams,* 504 U.S. 36, 44 (1992) ("It is permissible to undertake review of an important issue expressly decided by a federal court"); *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law").

Moreover, the Court's prudential rule that it will not consider a question that was not pressed or passed on below does not preclude review here. As Justice Scalia explained in *Williams,* 504 U.S. at 44, the Court's

"traditional rule – that it would not grant certiorari on a question that was 'not pressed or passed upon below,' " – "operates in the disjunctive." In this matter, Mr. DiRussa raised in his petition the same argument he made to the court of appeals. Thus, the petition satisfies the traditional rule. Moreover, it would be unreasonable to require Mr. DiRussa to have demanded the district court to establish a new less deferential standard of review as a condition for granting certiorari. *See Williams, supra,* 504 U.S. at 44.

Finally, if the Court agrees that either the panel or the courts below committed plain error, the Court may notice that error regardless of the underlying circumstances. *See also United States v. Virginia, supra,* 116 S.Ct. at 2286; *Connor v. Flinch, supra,* 431 U.S. at 421 n.19; and *Washington v. Davis, supra,* 426 U.S. at 238-239 (1976). Thus, there is no jurisdictional bar to certiorari.

CONCLUSION

For the reasons stated in the Petition and above, the Court should grant petitioner Raymond J. DiRussa a writ of certiorari.

Respectfully submitted,

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